United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7289

To be argued by
THOMAS P. BARTLEY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-7289

BERNARD FRIED,

: aintiff-Appellant,

-against-

ROBERT O. LOWERY, Commissioner, JOHN T. O'HAGAN, of the Fire Department, THOMAS J. HARNETT, JAMES T. WARD, JOHN V. SCHNEIBLE, CARMINE DeANGELES, et al.

Defendants-Appellees.

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P/S

APPEAL FROM ORDER OF DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES SAMUEL M. GOLD, FORMER JUSTICE OF SUPREME COURT, NEW YORK COUNTY, ABRAHAM J. GELLINOFF, JUSTICE OF THE SUPREME COURT, NEW YORK COUNTY AND NORMAN GOODMAN, AS COUNTY CLERK NEW YORK COUNTY

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BERNARD FRIED,

Plaintiff-Appellant,

-against-

ROBERT O. LOWERY, Commissioner, JOHN T. O'HAGAN, of the Fire Department, THOMAS J. HARNETT, JAMES T. WARD, JOHN V. SCHNEIBLE, CARMINE DeANGELES, EGEDIO E. ASINELLI, DR. GABRIEL SELEY, DR. SEYMOUR CUTLER, DR. JACQUES GABRILOVE, DR. JOHN F. CONNELL, NICHOLAS J. REINHARDT, FRANK KILKENNY, VICTOR ANSORGE, DR. BIAGGIO BATTAGLIO, PATSY MAGGIO, WOODROW OCHS, JOHN M. BARONE, ARTHUR CANARELLO, RICHARD HANRAHAN, RUTH W. WHALEY. KATHLEEN LOCKHART, ARTHUR C. VAN HOUTEN, JOSEPH DUGAN, DR. KAZUO YANAGISAWA, DR. JOSEPH A. CIMINO, DR. THOMAS J. CALVIN, DR. WALTER R. BRINITZER, DR. MAX HELFAN, LEROY CARMICHAEL, as Administrator of Queens General Hospital, DR. GEORGE YESSIN, ADRIAN P. BURKE, as Corporation Counsel, IRWIN L. HERZOG, DONALD L. TOBIAS, FRANCIS J. McNAMEE, FRANK SUROWITZ, SAMUEL GOLDIN, as Comptroller, MARIO PROCACACHINO, MR. JUSTICE SAMUEL M. GOLD, MR. JUSTICE ABRAHAM GELLINOFF, NORMAN GOODMAN, as County Clerk,

Defendants-Appellees.

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Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York, Thomas C. Platt, Judge, dated April 11, 1975 which dismissed the amended complaint brought pursuant to 42 U.S.C. Sec. 1983, against numerous defendants, including two State Supreme Court Justices and a County Clerk.

Questions Presented

1. Whether the amended complaint states a claim upon which federal relief may be granted?

2. Whether State Justices and the County Clerk are answerable in damages for acts committed in the exercise of their judicial functions?

Prior Proceedings

Appellant commenced a civil action against the defendants on or about February 8, 1974. By order and memorandum dated October 22, 1974, the action was dismissed without prejudice to file and serve a new complaint within sixty (60) days (Platt, D.J.). On December 16, 1974, the amended (denominated supplemental) complaint was filed and new summonses issued.

In naming a host of City of New York officials and employees, together with two New York State Court Justices and the County Clerk of New York County, appellant sought reinstatement as a Supervisory Fire Alarm Dispatcher, a civilian title within the New York City Fire Department and as an alternative, one million dollars in damages. Related to the former relief, if we read the amended complaint correctly, be sought declaratory judgment (a) to annul Sec. B3-39.0 of the Administrative Code of the City of New York (L. 1966, ch. 866) on the ground that it is unconstitutionally in conflict with Fed. Rules Civ. Proc. Rule 35, 28 U.S.C.A; (b) that the time limitations of Sec. B3-39.0 have not been complied with and to bar the introduction of psychiatric examinations held thereunder; (c) to annul a decision of a State court CPLR Article 78 proceeding on the ground of fraud which allegedly worked to deprive him of his rights in violation of 42 U.S.C. Sec. 1983. In addition, he seeks an order sealing all court records to all except appellant and to enjoin the Corporation Counsel from appearing for the New York City defendants, on the ground of conflict of interest. As a basis for the relief, the complaint sets forth, inter alia, that following a series of difficulties and incidents of many years duration involving superiors, and subordinates, plaintiff-appellant was involuntarily retired on a regular medical disability, involving psychiatric considerations, through fraud perpetrated by the municipal defendants who individually, collectively

and collusively conspired to defame and discredit him, by falsely and fraudulently obtaining medical evidence to effect his removal through retirement.

Those parts of the amended complaint addressed to the Justices and the County Clerk sought to redress alleged wrongs in connection with Civil actions commenced in a State Court. The claim was that Justice Gold, who decided a CPLR Article 78 proceeding, failed, refused or neglected to take judicial notice of the violation of Rule 35(a) of the United States Court act* and the infraction of Sec. B3-39.0 of the Administrative Code of the City of New York, so as to deprive plaintiff of due process and civil rights.

As against Justice Gellinoff, who decided a subsequent Civil proceeding, it was alleged that he erroneously dismissed the action on the grounds of res judicata and estoppel (apparently by reason of the determination in the first action); that "hopefully" he would have instead set aside the denial of the first Petition, except for the fact that, contrary to Justice Gellinoff's expressed instructions for it's requisition, the Corporation Counsel of the City of New York, failed, neglected, refused or may have suppressed the file of the earlier action, thereby causing the Court to rely on alleged hearsay allegtion of the Corporation Counsel. There was a further allegation of collusiveness between

* Fed. Rules Civ. Proc. Rule 35(a), 28 U.S.C.A.

the judiciary and an attorney associated with the City Corporation Counsel's office through failure of the Corporation Counsel to serve appellant's attorney with a copy of an affirmation, which was before the Court.*

The sole allegations relating to the Clerk consists of suppression of the file of the first proceedings by a "Person or Persons unknown to me" and a call for production of the file with an explanation.

On January 31, 1975 the State defendant's motion for an order pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the amended complaint came on to be heard before the Hon. Thomas C. Platt, Judge E.D.N.Y.

A representative of the Attorney General office and the plaintiff appeared. Both sides were heard on the merits at the conclusion of which, decision was reserved.

Subsequently the amended complaint was also dismissed as against the City of New York defendants.

* Appellant was represented by retained counsel, although different, on each of the civil proceedings. The change of attorneys was stated to be the result of many disappointments over broken promises, in addition to initial lack of funds.

POINT I

THE COMPLAINT WAS PROPERLY DISMISSED SINCE NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED

A. The District Court had no subject matter jurisdiction since State Supreme Court Justice and Court Clerks are immune from Civil Liability for Acts Performed by them in their judicial or official capacity

Appellant sought alternatively, an award of damages against two New York State Justices and a Clerk for alleged wrongdoings in the exercise of their judicial and official functions.

(1)

The doctrine of judicial immunity prevents the recovery of damages against a judge on account of action taken in the exercise of his judicial responsibilities. The insulation of members of the judiciary from civil suits has consistently been given full effect by the Supreme Court of the United States since its adoption of the doctrine in Bradley v. Fisher, 80 U.S. 335 (1872).

The general rule, laid down over a century ago is that judges are immune from suit for judicial acts within and even in excess of their jurisdiction even if those acts were done maliciously or corruptly; the only exception to this sweeping cloak of immunity exists for acts done in the clear absence of all jurisdiction. Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, supra, 335.

The reason why the law has established a privilege against being held judicially accountable for an act has never been better set forth than in the opinion of Judge Learned Hand in Gregoire v. Biddle, 177 F. 2d 579, 58 (2d Cir. 1949): "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of the outcome, would dampen the ardor of all but the most resolute, or most irresponsible, in the unflinching discharge of their duties".

The common law rule of judicial immunity from liability for damages was not abrogated by the Passage of 42 U.S.C. Sec. 1983. Pierson v. Ray, supra.

The federal judiciary has never hesitated to apply the doctrine of judicial immunity in actions brought against a judge. E.G. Blouin v. Dembitz, 489 F. 2d 488 (2d Cir. 1973); Fanale v. Sheehy, 385 F. 2d 866 (2d Cir. 1967); Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) affd. 401 U.S. 154 (1971); Garfield v. Palmieri, 193 F. Supp. 137 (S.D.N.Y. 1961), affd. 297 F. 2d 526 (2d Cir. 1962), cert. den. 369 U.S. 871 (1962); Garfield v. Palmieri, 193 F. Supp. 582 (E.D.N.Y. 1960), affd. 290 F. 2d 821 (2d Cir. 1961), cert. den. 368 U.S. 827 (1961); Morgan v. Sylvester, 125 F. Supp. 380 (S.D.N.Y. 1954) affd. 220 F. 2d 758 (2d Cir.), cert. den. 350 U.S. 867 reh. den. 350 U.S. 919 (1955).

A fair reading of the complaint reveals that the two justices, at the time of the alleged wrongs, were unquestionally acting in their judicial capacity.

Accordingly, the complaint was properly dismissed as against appellee Justices since the acts complained of were performed by them in their judicial capacities, and hence they are absolutely immune from civil suit.

(2)

The complaint was also properly dismissed as against the County Clerk since the doctrine of judicial immunity is applicable to a clerk of the court acting in his official capacity. Dieu v. Norton, 411 F. 2d 761, 763 (7th Cir. 1969); Stewart v. Minnick, 409 F. 2d 286 (9th Cir. 1969); Rhodes v. Meyer, 334 F. 2d 709, 718 (8th Cir. 1964); Carpenter v. Dethmers, 253 F. 2d 131 (6th Cir. 1958); Bennett v. Gravelle, 323 F. Supp. 203, 212 (D. Maryland, 1971). The complaint, so sketchy as to miss sufficiency, does, however, indicate official capacity of the clerk.

B. The complaint fail to State a Claim upon which federal relief can be granted

While it is recognized that pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers - Haines v. Kerner, 404 U.S. 519, 520, see Cruz v. Beto 405 U.S. 319, 322; Conley v. Gibson, 355 U.S. 41, 45-46;

Jackson v. Staler Foundation, 496 F. 2d 623 (2d Cir. 1974); cf. Dioguardi v. Durning, 319 F. 2d 794 (2d Cir. 1944), nonetheless construing plaintiff's allegation most liberally, his claims set forth no cause of action.

(1)

As against Justice Gold, the complaint avers he failed, refused or neglected to take judicial notice of the violation of Fed. Rules Civ. Proc. Rule 35a, 28 U.S.C.A. and the infraction of Sec. B-3-390 of the Administrative Code of the City of New York, thereby depriving plaintiff-appellant of his rights (pars. 5 and 24).

It is recognized that Section 1983 does not provide a remedy for ordinary or common law torts, Johnson v. Glick, 481 F. 2d 1028, 1033-34 (2d Cir., 1973); Street v. Burdyka, 492 F. 2d 368, 371 (4th Cir., 19774). Moreover the complaint does not allege a tort of a constitutional magnitude since it fails to state "in detail facts showing some intentional purpose or deprivation of Constitutional rights" (Moore v. Kibbee, 385 F. Supp. 765, 767 (E.D.N.Y. 1974). Indeed, there could be no intentional purpose as the complaint (par. 24) tells us "these violations of law were not called to my attention nor to that of the Justice presiding, Samuel M. Gold".

(2)

Concerning Justice Gellinoff, it was claimed that he erroneously dismissed an action on grounds of res judicata and estoppel because the Corporation Counsel, contrary to Justice Gellinoff's expressed instructions for it's requisition failed, neglected, refused or may have suppressed the file of the earlier action (pars. 3, 30-31). While pro se complaints should be construed literally, the rules do not require unreasonable construction or gross assumptions. Mahurn v. Moss, 313 F. Supp. 1263 (D.C. Mo. 1970). No actionable conduct can be attributable to Justice Gellinoff. Nothing in the complaint alleges facts which would support any finding of intent to deprive plaintiff of his constitutional rights. If anything, the conduct points to innocence and good faith. Plaintiff assumes in conclusory form that the file never did reach the attention of the Judge and that he relied exclusively on the word of the Corporation Counsel prior to rendering a decision. However, in an action brought under Civil Rights, plaintiff must make specific allegations of conduct by a defendant which he claims violates his constitutional rights and vague, general and conclusory allegations are not sufficient. Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck, 463 F. 2d 620, 622-623 (2d Cir. 1972) cert. den. 410 U.S. 944; Powell v. Workmen's Compensation Bd. of the State of New York, 327 F. 2d 131 (2d Cir. 1961). The claim that an affirmation by the Corporation Counsel was not served on the attorney for the defendant. Construed in it's best light, does not rise to the level necessary to construe purposeful and intentional conduct, at least not on the part of Justice Gellinoff.

(3)

As to the defendant, Goodman, it should be noted that mere allegations relating to a clerk's inability to produce a file on request of plaintiff, subsequent to the determination in each of the two State civil actions, hardly rise to a constitutional dimension. Any suit under 42 U.S.C. Sec. 1983 against a state official must be based upon a claim arising out of a clear violation of the complainant's constitutional or other federally protected rights. Cole v. Smith, 344 F. 2d 721 (8th Cir. 1965).

(4)

The allegation of conspiracy among the multiple defendants (pars. 4, 32), more particularly between the Corporation Counsel and the State defendants, in the light of the complaint as a whole, represents a confusing and foggy mixture of evidentiary statements, arguments and conclusory matter. Johnson v. Hunger, 266 F. Supp. 590 (S.D.N.Y. 1967). Moreover for the purposes of a motion for dismissal for failure to state a claim (R. 12[b][6]), only the "well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted (2A Moore's Federal Practice [2d ed.] p. 2266-9). The only semblence of conspiracy is the claim relative to Judge Gellinoff's request for the requisition of a file improperly buttressed by unwarranted deduction of fact that the Judge never obtained a file at any time thereafter before rendering his decision, or that he in fact relied entirely on the alleged collusive word of the Corporation Counsel.

So, too, paragraph 3 of the complaint, in contradiction, negates conspiracy. That factually, no conspiracy is made out, is clear from the vague language of paragraph 4 ("therefore appear"; "may have been collusion"). None of the "acts" charged to the judiciary can be taken as "overt acts" in furtherance or within the framework of the purported conspiracy.*

(5)

That portion of the complaint which seeks to annul the determination of the State Article 78 proceeding cannot withstand a motion to dismiss. "Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the State appellate courts and ultimately this Court". Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970).** See also Lecci v. Cahn, 493 F. 2d 826 (2d Cir. 1974); United States ex rel. Cataliotte v. Mancusi, 309 F. Supp. 1182 (S.D.N.Y. 1970). Moreover,

> "The Civil Rights Act was not designed to be used as a substitute for the right of appeal. . ." Coogan v. Cincinnoti Bar Ass'n., 431 F. 2d 1209, 1211 (6th Cir. 1970).

The general allegation that the state Courts' decisions and actions were erroneous is insufficient to state a federal claim.

* A substantial part of the allegation in the complaint is traceable to grievances with his own attorneys.

** The complaint indicates notices of appeal were filed in the State appellate courts.

Therefore, no federal question was presented by appellant's complaint, nor could the complaint be construed or alleging the deprivation of any federally secured right.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DISMISSING THE COMPLAINT SHOULD
BE AFFIRMED IN ALL RESPECTS

Dated: New York, New York
October 2, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
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Appellees

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Defendants-Appellees herein. On the 2nd day of October , 1975 , she served the annexed upon the following named persons :

BERNARD FRIED
88-11 Elmhurst Avenue
New York, NY 11373

Corporation Counsel
City of New York
Municipal Building
New York, NY
Att: Kevin Sheridan, Esq.

Attorney in the within entitled action by depositing 3 copies ~~X~~a true and correct ~~X~~copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address es within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
2nd day of October , 1975

Assistant Attorney General
of the State of New York